TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 495.

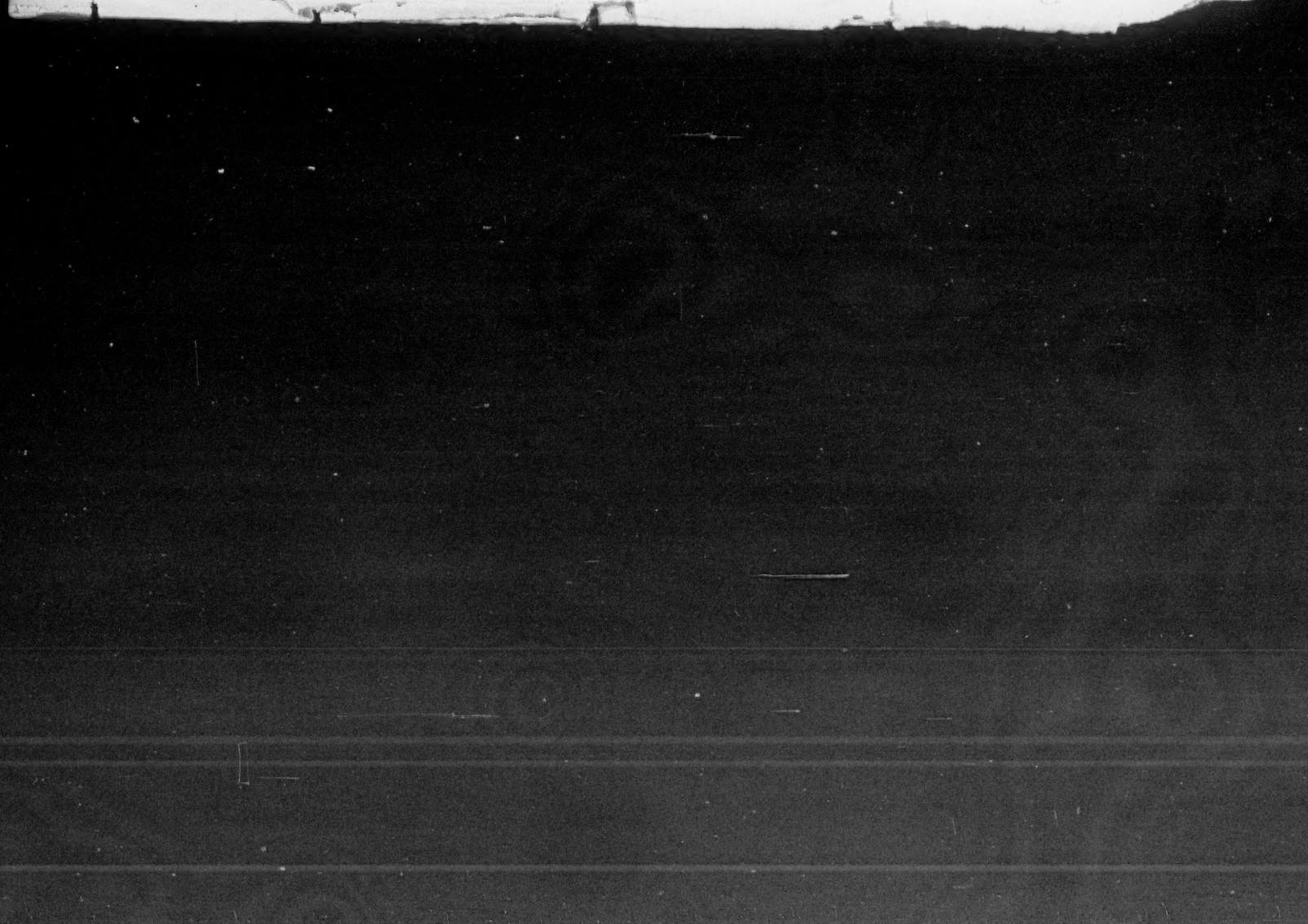
WILLIAM F. WHITE AND LUCY B. WHITE, PLAINTIFFS IN ERROR,

vs.

NICHOLAS LUNING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 11, 1874.



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a UNITED STATES OF AMERICA, *ss:*

To Nicholas Luning, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein William F. White and Lucy B. White are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, this twenty-sixth day of March, A. D. 1874, and of the Independence of the United States the ninety-eighth.

[SEAL.]

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

b UNITED STATES OF AMERICA,
District of California,
City and County of San Francisco, ss:

Joseph P. Phelan, being sworn, deposes and says that he is the attorney for the plaintiffs in error in the action of Nicholas Luning vs. William F. White and Lucy B. White in the within citation mentioned; that affiant did on the 28th day of March, A. D. 1874, at the said city and county, serve the within citation on the attorneys for the defendant in error in said action by delivering to Sidney V. Smith, jr., one of said attorneys, and leaving with him on said last-mentioned day and place a true copy of said citation, certified to be such by the clerk of the said circuit court.

JOS. P. PHELAN.

Subscribed and sworn to before me this 28th day of March, 1874.

L. S. B. SAWYER,
U. S. Com'r, &c.

(Indorsed:) No. 971. United States Supreme Court. William F. White and Lucy B. White, plffs. in error, vs. Nicholas Luning, deft. in error. Citation. Filed March 28th, A. D. 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. c'k.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, in the ninth judicial circuit, greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William F. White and Lucy B. White, plaintiffs in error, and Nicholas Luning, defendant in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be' inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this second Monday of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

Attest:

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clk.*

d The answer of the judges of the circuit court of the United States for the district of California, in the ninth judicial circuit.

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep. Clerk.*

(Indorsed:) No. 971. United States Supreme Court. William F. White and Lucy B. White, plffs. in error, vs. Nicholas Luning, deft. in error. Writ of error. Filed 26th March, 1874. L. S. B. Sawyer, clk., by J. F. O'Beirne, dep. clk.

1 UNITED STATES OF AMERICA:

In the circuit court of the United States, of the ninth circuit, in and for the district of California.

NICHOLAS LUNING, PLAINTIFF,
vs.
WILLIAM F. WHITE AND LUCY B. WHITE, DEFENDANTS.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city of San Francisco.

Summons.

The President of the United States of America, greeting, to William F. White and Lucy B. White, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, a copy of which accompanies this summons, in the office of the clerk of said court
2 in the city and county of San Francisco, within ten days after

the service on you of this summons, if served in this county, or, if served out this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to obtain a judgment against you for the possession of certain lands and premises situated in said district, and particularly described in said complaint, together with damages alleged to have been sustained by the plaintiff, for the unlawful withholding thereof, and for the loss of the value of the rents and profits thereof, together with costs of suit; and if you fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, this 28th day of June, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety-fifth.

3 [SEAL.] LORENZO S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D. C.*

(Endorsed:)

OFFICE OF UNITED STATES MARSHAL,
DIST. OF CALIFORNIA.

I hereby certify that I personally served certified copies of the within summons and certified copies of the complaint upon Wm. F. White and Lucy B. White, by delivering the same to them in the township of Pajaro and county of Santa Cruz, on the 23d day of August, A. D. 1871.

WM. GOUVERNEUR MORRIS,
U. S. Marshal,
By B. J. AKERMAN, *Deputy*.

SIDNEY V. SMITH & SON, Esqs.,
Plaintiff's Attorneys.

Filed August 25, 1871.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

4 *Complaint.*

The United States circuit court in and for the district of California.

NICHOLAS LUNING
vs.
WILLIAM F. WHITE AND LUCY B. WHITE.

The plaintiff complains of the above-named defendants, and for cause of action shows—

That plaintiff is a citizen of the Empire of Germany, and a resident of the city and county of San Francisco, State of California.

That defendants are citizens of the United States of America, and residents of the county of Santa Cruz, State of California.

That on the 1st day of June, 1871, and for a long time prior thereto, plaintiff was, and from thence hitherto has been and still is, the owner, and seized in fee-simple and entitled to the possession of all that tract of land situate in the county of Santa Cruz, State of California, being

part of the rancho Sal Si Puedas; beginning at a post marked
5 S, which stands in the old fence on the south boundary of the land of W. F. White, south 46½° east 6.06 chains, from the east line of White's valley partition; thence by true meridian (magnetic variation 15° 30′ east) along said fence and on said line of partition the following courses: South 46° 30′ east 20.47 chains; south 60° 30′ east 4.12 chains; south 73° east, 4.24 chains; south 77° east, 12.14 chains; south 88½° east, 18 chains; south 69¼° east, 3.70 chains; thence north 47½° east, 127 chains; thence the following courses: North 52½° west 11.10 chains; south 75½° west, 15.90 chains; south 79° west, 11.40 chains; north 20° west, 2 chains; south 83½° west, 12.80 chains; north 72° west 13.70 chains; north 22¼° west 6.20 chains; north 65° west 5.16 chains; north 59½° west 7.93 chains; north 42¼° west 14.71 chains; north 1° east 11 chains; north 3° west 25.90 chains; north 26¾° west 4.50 chains; south 46¼° west 77.76 chains, to the pasture-fence; thence along said pasture-fence the following courses: South 34° 20′ east 11.43 chains; south 10° east 3.16 chains; south 27½° west 4.71 chains; south 40° west 2.36 chains; south 65° 50′ west 4.90 chains; south 47½° west 4.86
6 chains; south 72½° west 10.55 chains; south 89½° west 5.27 chains; south 65° west 11.74 chains, to a post marked S, from which a forked red-oak 12 inches in diameter, marked B T, bears south 65° west distant 38 links; thence south 47° 42′ east 50.52 chains to a post on the south side of a ravine; and thence south 41° 37′ west 17.32 chains to the place of beginning, containing 1,021¾ acres.

That on the said 1st day of June, 1871, while plaintiff was so seized as aforesaid, defendants unlawfully and wrongfully entered into possession of said premises, and ousted and ejected plaintiff therefrom, and from thence hitherto have wrongfully and unlawfully withheld and do still wrongfully and unlawfully withhold the possession thereof, to plaintiff's damage in the sum of five thousand dollars.

Wherefore plaintiff prays that he may recover possession of said premises from defendants, and that he may have judgment therefor, and for damages as aforesaid in the sum of five thousand dollars, besides costs of suit.

Dated San Francisco, June 28th, 1871.

SIDNEY V. SMITH & SON,
Plaintiff's Attorneys.

7 (Endorsed:) Filed June 28th, 1871. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

8 *Separate answer of Wm. F. White.*

United States circuit court in and for the district of California.

NICHOLAS LUNING, PLAINTIFF, *vs.* WILLIAM F. WHITE AND LUCY B. WHITE, DEFENDANTS. } Separate answer of William F. White.

The defendant, William F. White, for answer to the complaint herein of the above-named plaintiff,

Denies each and every allegation and averment in said complaint contained.

And for a further and separate answer this defendant avers that on the first day of June, 1871, he was, and hath ever since been and now is, in possession of the lands and premises in the complaint de-

scribed, but avers that he was and is so in possession thereof only as the servant and agent of his co-defendant, Lucy B. White.

That the said Lucy B. White was, on said last-mentioned day, ever since has been and now is, the owner, seized in fee and entitled
9 to the exclusive possession of the said lands and premises in the complaint described, and of every part thereof.

Further answering, this defendant avers that neither the plaintiff nor any or either of his ancestors, predecessors, or grantors, have been seized or possessed of the lands and premises in the complaint described, or of any part thereof, within five years next before the time of the filing of the complaint in this action. Wherefore this defendant avers and insists that the plaintiff's said action is barred by the provisions of sections 6 and 7 of an act of the legislature of the State of California, entitled "An act defining the time for commencing civil actions," passed April 22, 1850.

Further answering, this defendant avers that his co-defendant, Lucy B. White, and those under whom she claims, entered into the possession of the said lands and premises in the complaint described more than five years next before the filing of the complaint in this action under claim of title, exclusive of any other right, founding such claim upon a written instrument, to wit, a conveyance in fee of the said lands
10 and premises; and that the said Lucy B. White, and those under whom she claims have ever since said entry aforesaid continuously occupied and possessed said lands and premises, under claim of title, adversely to the plaintiff herein and to all the world, and have had the actual, open, notorious, continuous, uninterrupted, peaceable, adverse, and exclusive possession thereof, and of every part thereof, ever since said entry, and for five years and upwards next before the filing of the complaint in this action. Wherefore this defendant avers and insists that the plaintiff's said action is barred by the provisions of sections ten and eleven of an act of the legislature of the State of California, entitled "An act defining the time for commencing civil actions," passed April 22d, 1850.

Further answering, this defendant avers that for five years and upwards, next before the filing of the complaint in this action, his co-defendant, Lucy B. White, and her ancestors, predecessors, and grantors, and those under whom she claims, have had and been in the actual, adverse, open, notorious, continuous, uninterrupted, peaceable,
11 and exclusive possession of the lands and premises in the complaint herein described, and of every part thereof, holding and occupying the same during the whole of said period under a claim of title in fee in themselves, exclusive of any other right, and adversely to the plaintiff herein and to all the world. Wherefore this defendant avers and insists that the plaintiff's said action is barred by the provisions of sections twelve and thirteen of an act of the legislature of the State of California, entitled "An act defining the time for commencing civil actions," passed April 22d, 1850.

Wherefore this defendant prays to be hence dismissed with his costs.

J. P. PHELAN,
Attorney for Defendant Wm F. White.

(Endorsed:) Service of within is hereby admitted this 3d day of October, A. D. 1871.

SIDNEY V. SMITH & SON,
Attys. for Plaintiff.

Filed 3 October, 1871.

L. S. B. SAWYER, *Clerk.*

Separate answer of Lucy B. White.

United States circuit court in and for the district of California.

NICHOLAS LUNING, PLAINTIFF,
vs.
WILLIAM F. WHITE AND LUCY B. WHITE, DEFENDANTS.

Separate answer of Lucy B. White.

The defendant Lucy B. White, for answer to the complaint of the above-named plaintiff, denies each and every allegation and averment in said complaint contained.

And for a further and separate answer this defendant avers that she was, on the first day of June, A. D. 1871, ever since has been, and still is, the owner, seized in fee and possessed and entitled to the possession of the lands and premises in the complaint described.

Further answering, this defendant avers that neither the plaintiff nor any or either of his ancestors, predecessors, or grantors, has been seized or possessed of the lands and premises in the complaint described, or of any part thereof, within five years next before the
13 filing of the complaint in this action. Wherefore this defendant avers and insists that the plaintiff's said action is barred by the provisions of sections (6) six and seven (7) of an act of the legislature of the State of California, entitled "An act defining the time for commencing civil actions," passed April 22d, 1850.

Further answering, this defendant avers that she and those under whom she claims entered into the possession of the said lands and premises in the complaint described, more than five years next before the filing of the complaint in this action under claim of title, exclusive of any other right, founding such claim upon a written instrument, to wit, a conveyance in fee of the said lands and premises, and that this defendant, and those under whom she claims, have ever since said entry aforesaid continuously occupied and possessed said lands and premises, under such claim of title, adversely to the plaintiff herein and to all the world, and have had the actual, open, notorious, continuous, uninterrupted, peaceable, adverse, and exclusive possession thereof, and of every part thereof, ever since said entry, and for five years
14 and upwards next before the filing of the complaint in this action; wherefore this defendant avers and insists that the plaintiff's said action is barred by the provisions of sections 10 and 11 of an act of the legislature of the State of California, entitled "An act defining the time for commencing civil actions," passed April 22d, 1850.

Further answering, this defendant avers that, for five years and upwards next before the filing of the complaint in this action, she and her ancestors, predecessors, and grantors, and those under whom she claims, have had and been in the actual, adverse, open, notorious, continuous, uninterupted, peaceable, and exclusive possession of the lands and premises in the complaint herein described, and of every part thereof, holding and occupying the same during the whole of said period under a claim of title in fee in themselves, exclusive of any other right and adversely to the plaintiff herein, and to all the world; wherefore this defendant avers and insists that the plaintiff's said action is barred by the provisions of sections twelve and thirteen of an act of the legislature of the State of California, entitled "An act defining the time for commencing civil actions," passed April 22d, 1850.

15 Wherefore this defendant prays to be hence dismissed with her costs of action.

J. P. PHELAN,
Attorney for Defendant Lucy B. White.

(Endorsed:)

Service of within is hereby admitted this 3 day of October, A. D. 1871.

SIDNEY B. SMITH & SON,
Attys. for Plff.

Filed 3 October, 1871.

L. S. B. SAWYER, *Clerk.*

16 *Findings.*

Circuit court of the United States of the ninth circuit, in and for the district of California.

NICHOLAS LUNING
v.
WILLIAM F. WHITE ET AL.

A jury having been waived by a stipulation of the parties, in writing, duly filed, this cause came on to be tried by the court, without a jury, on the 27th and 29th days of November, A. D. 1872, and after hearing the testimony and the arguments of counsel, the court being sufficiently advised, now finds the following facts and conclusions of law, viz:

First. That the rancho Sal Si Puedes lies partly in the county of Santa Cruz and partly in the county of Santa Clara, and was finally surveyed and patented to the claimants, of whom the said William F. White was one, in the year 1861.

17 Second. On the 11th day of April, 1866, the defendant, W. F. White, was the owner of certain portions of the said Sal Si Puedes rancho, and, as such owner, mortgaged the same to the plaintiff herein.

Third. An action was afterwards commenced by the plaintiff herein, in the district court of the 3rd judicial district of the State of California for the county of Santa Cruz, against the said William F. White and other defendants, to foreclose said mortgage, and such proceedings were duly had therein that on the 11th day of April, 1866, a judgment of foreclosure and sale was entered therein, whereby, among other things, it was decreed that the mortgaged premises should be sold at public sale by the sheriff of Santa Cruz County, and the proceeds of such sale should be paid over to the plaintiff therein. The premises in controversy were embraced in said mortgage, and in the lands directed to be sold by said decree.

Fourth. That afterwards the defendant, William F. White,
18 directed the said sheriff to sell said mortgaged premises in parcels, one of which parcels contained 1,021¾ acres; and said sheriff thereupon, in obedience to said judgment and said directions of said White, on the 20th day of August, 1866, duly sold said premises in parcels, and at said sale the plaintiff became the purchaser of three of said parcels for the sum of fifteen thousand six hundred dollars, the other parcels being sold to other purchasers. Which parcels are not separately described in the decree and order of sale, but are embraced in the description therein set forth.

Fifth. That afterwards, and in pursuance of said sale, on the 27th day of February, 1867, the time for redemption from said sale having elapsed, Albert Jones, sheriff of the county of Santa Cruz, executed, acknowledged, and delivered to the plaintiff his sheriff's deed, wherein it was recited that by a certain judgment of foreclosure and sale, entered in the district court of the third judicial district of the State of California, in and for the county of Santa Cruz, in the action of Nicholas Luning, plaintiff, against William F. White, Frances J. White,
19 Eugene Casserly, and Nicholas McCarty, defendants, on the 11th day of April, 1866, the said sheriff was commanded to sell at public auction, according to law, to satisfy the said judgment, amounting to $23,968.69, and interest and costs of suit, and expenses of sale.

That in pursuance of a certified copy of the order of sale, duly delivered to the said sheriff, he duly advertised, and sold at public auction, on the 20th day of August, 1866, at 12 o'clock noon, to the highest bidder, for cash, three several parcels of land to the plaintiff for the sum of $15,600.00, he being the highest and best bidder therefor, and delivered to him a certificate of sale, as required by law; that the time allowed by law for redemption expired without redemption having been made; that said sheriff, in pursuance of said judgment and of the statute in such case made and provided, for the consideration of $15,600.00, granted and conveyed to the plaintiff the said three parcels of land firstly, secondly, and thirdly described in said deed.

That the premises sought to be recovered in this action are described in said deed as one of said parcels, as follows: "All that tract of
20 land situate in the county of Santa Cruz, being part of the rancho Sal Si Puedes, beginning at a post, marked "S," which stands in the old fences on the south boundary of the land of W. F. White, south 46½° east 6 $\frac{18}{100}$ chains, from the east line of White's valley partition; thence by true meridian (magnetic variation, 15° 30′ east,) along said fence, and on said line of partition the following courses: S. 46° 30′ E. 20 $\frac{47}{100}$ chains, S. 60° 30′ E. 4 $\frac{15}{100}$ chains, S. 73° E. 4 $\frac{34}{100}$ chains, S. 77° E. 12 $\frac{14}{100}$ chains, S. 88½° E. 18 chains, S. 69¼° E. 3 $\frac{70}{100}$ chains, N. 47½° E. 127 chains, to the north boundary of the rancho Sal Si Puedes on the mountains; thence along said north boundary the following courses: N. 52½° W. 11 $\frac{18}{100}$ chains, S. 75½° W. 15 $\frac{00}{100}$ chains, S. 79° W. 11 $\frac{48}{100}$ chains, N. 20° W. 2 chains, S. 83½° W. 12 $\frac{80}{100}$ chains, N. 72° W. 13 $\frac{70}{100}$ chains, N. 22¼° W. 6 $\frac{20}{100}$ chains, N. 65° W. 5 $\frac{16}{100}$ chains, N. 59½° W 7 $\frac{36}{100}$ chains, N. 42¼° W. 14 $\frac{74}{100}$ chains, N. 1° E. 11 chains, N. 3° W. 25 $\frac{00}{100}$ chains, N. 26¾° W. 4 $\frac{50}{100}$ chains, S. 46¼° W. 77 $\frac{50}{100}$ chains, to the pasture-fence; thence along said pasture-fence the following courses: S. 34° 20′ E. 11 $\frac{43}{100}$ chains, S. 10° E. 3 $\frac{16}{100}$ chains, S. 27½° W. 4 $\frac{74}{100}$ chains, S. 40° W. 2 $\frac{36}{100}$ chains, S. 65° 50′ W. 4 $\frac{80}{100}$ chains, S. 47½° W. 4 $\frac{88}{100}$ chains, S. 72½° W. 10 $\frac{88}{100}$ chains, S. 89½° W. 5 $\frac{37}{100}$ chains, S. 65° W. 11 $\frac{74}{100}$
21 chains, to a post marked S, from which a forked red-oak, 12 inches in diameter, marked "B. T." bears S. 65° W., distant 38 links; thence S. 47° 42′ E. 50 $\frac{35}{100}$ chains, to a post on the south side of a ravine, and thence S. 41° 37′ E. 17 $\frac{35}{100}$ chains to the place of beginning, containing 1,021¾ acres."

Sixth. That the post marked "S," being the point of beginning mentioned in said deed, the fence along the line of partition, the mountains, the pasture-fence, the forked red-oak marked "B. T." the post on the south side of a ravine, all of which are called for in said deed, are all well known and existing monuments, and are all within the county of Santa Cruz. That the said partition-fence does not run to or in the direction of either the north boundary of the rancho Sal Si Puedes or

the mountains, but runs nearly parallel thereto, and that the course N. 47½° east 127 chains is not the course of such partition fence, but is nearly at right angles thereto. That the summit of the first range of mountains is the northerly boundary-line between said county of Santa Cruz and said county of Santa Clara, and said summit and said
22 county line are about the distance of 127 chains from the point in said fence where the course N. 47½° E. begins, and in the direction of said course.

That the northerly boundary of said rancho Sal Si Puedes is not in the county of Santa Cruz, but in the county of Santa Clara on another range of mountains, about three-quarters of a mile beyond the summit of said first range of mountains, and beyond the said county line situate thereon in the same (northerly) direction.

That leaving said fence at the point where the course N. 47½° E. 127 chains begins, and running thence the said course and distance, and all the remaining courses and distances as laid down in said deed, but rejecting the words of the call at the end of said course, "the north boundary of the rancho Sal Si Puedes on," and, "along said north boundary," and changing the last course of the description from south 41° 37′ east, so as to make it read south 41° 37′ west 17 $\frac{23}{100}$ chains to the place of beginning; all other calls, monuments, courses, and distances in said deed completely harmonize, and the lines enclose a tract of land containing 1021¾ acres of land situate entirely within the
23 county of Santa Cruz, being the quantity of land called for in said sheriff's deed, and the same tract of land sued for in this action; or, in other words, if, from the point of beginning, the courses and distances of said description contained in said sheriff's deed, being the field notes of the survey, are followed from the point of beginning, changing east into west in the last course, the lines would close, embracing the said lands, and would correspond with all the other calls and monuments mentioned in the deed, except that there would be a departure, at nearly right angles from the fence at the beginning of the call N. 47½° E. 127 chains, and the lines would not extend to, or in any manner correspond with, the north boundary of the rancho Sal Si Puedes.

Seventh. That if the course N. 47½ E. should be continued some three-quarters of a mile beyond the 127 chains called for in the deed, to the north boundary of the rancho Sal Si Puedes, and from that point the remaining courses and distances be run according to the calls in the said sheriff's deed, the line so run would not follow the north
24 line of the rancho other than its general course, nor touch the partition fence, nor correspond with any of the other subsequent calls named in the deed, nor would the lines close, nor would they enclose the land sued for, nor the quantity called for in the deed.

Eighth. That if from the point at the end of the course N. 47½° E. 127 chains, the remaining courses and distances should be run as laid down in the said sheriff's deed to the point of beginning of the course "S 46¼° W. 77.76 chains to the pasture-fence," the said line would run along the summit of the said first mountain-range in the same general direction of the county line, but would not follow it; running thence the last-named course and distance, the partition-fence would be reached, not in the general course of the county line, but in a course nearly at right angles to the general course of said county line. The pasture-fence, and all calls, other than these herein in the sixth and ninth findings named as excepted and rejected, would be reached by following the courses and distances called for in the said sheriff's deed.

25 Ninth. That all the calls in the said description cannot be harmonized so as to enclose the premises sought to be recovered, nor any other land; that the call for continuing the line along White's valley partition-fence beyond the point where the call for course and distance is "N. 47½° E.," is repugnant and inconsistent; that the call for the northern boundary of the rancho Sal Si Puedes on the mountains is false and mistaken; that the calls to run along that northern boundary till the pasture-fence is reached is alike false and mistaken; that without rejecting each of the said false, mistaken, and repugnant calls, the description will not enclose the land in controversy.

That afterwards, on the day of , A. D. 18 , the defendants entered upon and ousted the plaintiff from said land, and, at the commencement of this action, were and are still in possession thereof, without any title thereto whatsoever.

26 CONCLUSIONS OF LAW.

That the said false, mistaken, and repugnant calls in these findings mentioned should be rejected from the said description, and the calls for courses and distances from the starting point be adopted as descriptive of the lands conveyed by said sheriff's deed, rejecting the said false, mistaken, and repugnant calls therefrom.

That by virtue of said sale and sheriff's deed, the title to the land described in the plaintiff's complaint became, and still is, vested in fee-simple absolute in the plaintiff herein, and that the plaintiff is entitled to recover in this action the land and premises described in the complaint by courses and distances, rejecting from the description in the said sheriff's deed the said false, mistaken, and repugnant calls; together with his costs of suit.

Let judgment be entered accordingly.

LORENRO SAWYER,
Circuit Judge.

27 (Endorsed:) Filed January 15, A. D. 1874, as of January 27th, A. D. 1873, per order of judge. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

28 *Judgment.*

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

NICHOLAS LUNING
vs.
WILLIAM F. WHITE AND LUCY B. WHITE. } No. 971.

This cause having come on regularly for trial on the 27th day of November, A. D. 1872, being a day in the October term, A. D. 1872, of said court, before the court, sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties, duly filed, Sidney V. Smith & Son, esqs., appearing on behalf of plaintiff, and William Irvine, esq., on behalf of defendants, and the trial having been proceeded with on the 29th of said November, and witnesses on behalf of the plaintiff and of the defendants having been sworn and examined, and the evidence being closed, the cause, after arguments of counsel, having been submitted to the court for considera-

tion and decision, and the court having, after due deliberation,
29 filed its finding in writing and ordered that judgment be entered herein in accordance therewith.

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that Nicholas Luning, plaintiff, do have and recover of and from William F. White and Lucy B. White, defendants, the possession of all that tract of land situate in the county of Santa Cruz, State of California, being part of the rancho Sal Si Puedas, beginning at a post marked S, which stands in the old fence on the south boundary of the land of W. F. White, south 46½° east 6.06 chains from the east line of White's valley partition; thence by true meridian (magnetic variation 15° 30′ east) along said fence, and on said line of partition the following courses: South 46° 30′ east 20.47 chains; south 60° 30′ east 4.12 chains; south 73° east 4.24 chains; south 77° east 12.14 chains; south 88½° east 18 chains; south 69¼° east 3.70 chains; thence north 47½° east 127 chains; thence the following courses: North 52½° west 11.10 chains; south 75½° west 15.90 chains; south 79° west 11.40 chains; north 20° west 2 chains; south 83½° west 12.80 chains;
30 north 72° west 13.70 chains; north 22¼° west 6.20 chains; north 65° west 5.16 chains; north 59½° west 7.93 chains; north 42¼° west 14.71 chains; north 1° east 11 chains; north 3° west 25.90 chains; north 26¾° west 4.50 chains; south 46¼° west 77.76 chains, to the pasture-fence; thence along said pasture-fence the following courses: South 34° 20′ east 11.43 chains; south 10° east 3.16 chains; south 27½° west 4.71 chains; south 40° west 2.36 chains; south 65° 50′ west 4.90 chains; south 47½° west 4.86 chains; south 72½° west 10.55 chains; south 89½° west 5.27 chains; south 65° west 11.74 chains, to a post marked S, from which a forked red oak, 12 inches in diameter, marked B. T., bears south 65° west distant 38 links; thence south 47° 42′ east 50.52 chains, to a post on the south side of a ravine; and thence south 41° 37′ west 17.32 chains, to the place of beginning, containing 1,021¾ acres, and his costs in this behalf expended, taxed at three hundred and twenty-two $\frac{88}{100}$ ($322.$\frac{88}{100}$) dollars.

Judgment entered the 15th day of January, A. D. 1874.

L. S. B. SAWYER, *Clerk.*

31 A true copy of an original entered in the therein entitled cause, in judgment register C L, No. 2, pages 23 and 24.

Attest, &c.,

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 15 January, 1874. L. S. B. Sawyer, clerk.

UNITED SATES OF AMERICA:

32 *Certificate to judgment-roll.*

Circuit court of the United States, ninth judicial circuit, district of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing papers attached together constitute the judgment-roll in the cause therein entitled.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at San Francisco, this 15th day of January, A. D. 1874.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

33 (Endorsed:) Judgment-roll. Filed January 15, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

34 *Bond.*

Supreme Court of the United States.

On writ of error to the circuit court of the United States for the ninth circuit, State of California.

Know all men by these presents that we, William F. White and Lucy B. White, as principals, of Watsonville, in the county of Santa Cruz, State of California, of in said State, and , of , in said State, are held and firmly bound unto Nicholas Luning, of San Francisco, California, in the sum of one thousand six hundred dollars, lawful money of the United States, to be paid to the said Luning, his executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the tenth day of February, A. D. 1873.

35 Whereas the above-named William F. White and Lucy B. White have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the circuit court of the United States in and for the ninth circuit, State of California, in an action wherein said Luning was plaintiff and said William F. White and Lucy B. White were defendants, for the recovery of certain lands and for costs.

Now, therefore, the condition of this obligation is such that if the above-named William F. White and Lucy B. shall prosecute their said writ of error to effect, and anwer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WM. F. WHITE. [SEAL.]
LUCY B. WHITE. [SEAL.]
F. D. ATHERTON. [SEAL.]
W. W. STOW. [SEAL.]

UNITED STATES OF AMERICA,
District of California,
City and County of San Francisco, ss:

36 F. D. Atherton and W. W. Stow, being severally duly sworn, each for himself doth depose and say that he is a resident and freeholder within the State of California and district aforesaid, and that he is worth the sum of five thousand dollars over and above all his just debts and liabilities, which he owes or has incurred, and in property not exempt from execution.

W. W. STOW.
F. D. ATHERTON.

Sworn to before me this 17th day of February, 1873.
L. S. B. SAWYER,
Clerk and Comm'r U. S. Circuit Court, &c.

(Endorsed:) The within undertaking is approved as to form and as to sufficiency of sureties.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Circuit.

Filed the 25 March, 1874, as of the 17th day of February, 1873, by order of judge.

L. S. B. SAWYER, *Clerk.*

37 *Assignment of error.*

Supreme Court of the United States.

NICHOLAS LUNING, DEFENDAN' IN ERROR, *vs.* WILLIAM F. WHITE AND LUCY B. WHITE, plaintiffs in error.	In error Of October term, A. D. 1874.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, come the said William F. White and Lucy B. White, by their attorney, William Irvine, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit:

That the complaint aforesaid, and the matters therein contained, are not sufficient in law for the said Nicholas Luning to have or maintain his aforesaid action thereof against the said William F. White and Lucy B. White.

38 There is also error in this, to wit: In the conclusion of law, in said record contained, that the said false, mistaken, and repugnant calls in the said findings of fact, also in the said record set forth, should be rejected from the said description, and the calls for courses and distances from the starting-point be adopted as descriptive of the lands conveyed by the said sheriff's deed, and rejecting the said false, mistaken, and repugnant calls therefrom.

There is also error in this, to wit: In the conclusion of law in the said record contained, that by virtue of the sale and sheriff's deed, the title to the land described in the said complaint became and still is vested in fee-simple absolute in the said Nicholas Luning, and that he is entitled to recover the said land and premises described in the said complaint by courses and distances, rejecting from the description in the said sheriff's deed the said false, mistaken, and repugnant calls in the said findings of fact fully set forth.

39 And there is error in this, to wit: That, by the record aforesaid, it appears that the judgment aforesaid given was given for the said Nicholas Luning against the said William F. White and Lucy B. White, whereas, by the law of the land, the said judgment ought to have been given for the said William F. White and Lucy B. White against the said Nicholas Luning.

And the said William F. White and Lucy B. White pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they be restored to all things which they have lost by occasion of the said judgment, &c.

WM. IRVINE,
Atty. for Plffs. in Error.

(Endorsed:) Filed 6th April, 1874. L. S. B. Sawyer, clk., by J. F. O'Beirne, dep. clk.

40 Supreme Court of the United States.

NICHOLAS LUNING, DEFENDANT IN ERROR,
v.
WILLIAM F. WHITE AND LUCY B. WHITE,
plaintiffs in error.

We hereby admit service upon us of the assignments of error filed by the plaintiffs in error in the above-entitled cause.

Dated April 8th, 1874.

(S'g'd) SIDNEY V. SMITH & SON,
Attorneys for Defendants in Error.

(Endorsed:) Filed 8th April, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dy. clk.

41 UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, in the ninth judicial circuit, do hereby certify that the foregoing thirty-nine written pages, numbered from 1 to 39, both inclusive, are a true copy of the record and of all the proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said circuit court this eighth day of April, 1874.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsement on cover:) No. 495. William F. White and Lucy B. White, plaintiffs in error, vs. Nicholas Luning. California C. C. U. S. Filed 11th September, 1874.

IN THE

Supreme Court of the United States.

No. 44.—October Term, 1875.

W. F. White and Lucy B. White, Plaintiffs in Error,

vs.

Nicholas Luning.

In error to the Circuit Court of the United States for the District of California.

Brief of Montgomery Blair, for Plaintiffs in Error.

STATEMENT.

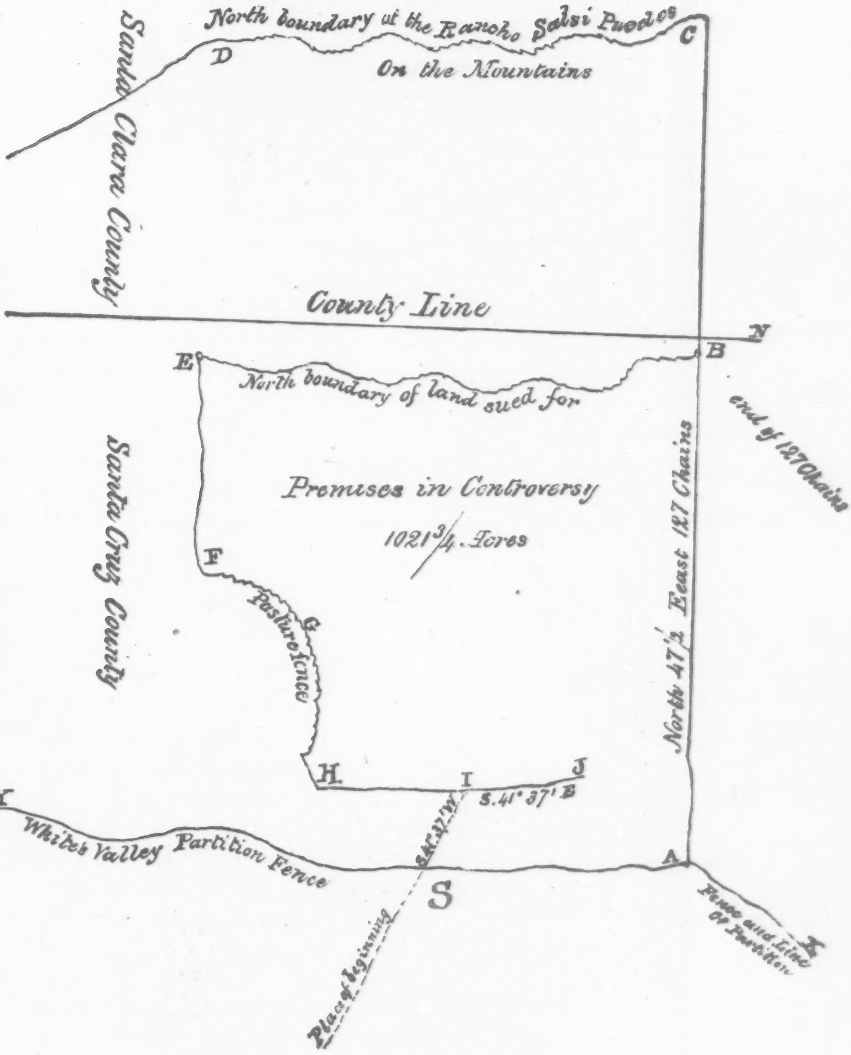
This is an action for ejectment brought in June, 1871, by defendant in error.—(p. 4.) The plaintiffs in error denied all the allegations of the complaint.—(p. 5.) A jury was waived, and the court found, and gave judgment for the defendant in error.—(p. 7.)

The court found (pp. 7, 8, 9, 10) that plaintiff in error, Wm. F. White, was one of the owners of the Rancho Salsi Puedes, which lies in the counties of Santa Cruz and Santa Clara, and was patented in 1861; that in 1866 said White, being owner thereof, mortgaged certain portions of said rancho to defendant; that the mortgage was foreclosed, and the property ordered to be sold, and was sold by the sheriff of the county of Santa Cruz; that said White directed said land to be sold in parcels, of three of which said defendant, Luning, became the purchaser at the price of $15,600; and afterwards said sheriff gave said Luning a deed, dated 27th February, 1867, for the

several tracts so purchased (p. 8), one of which is the subject of this action.

The court finds that the landmarks mentioned in said sheriff's deed, and in the description given of the tract sued for, are well known; but that the description given in said deed varies greatly from the description given in the complaint.

The points of difference can be more readily explained by referring to the annexed plat, in which S, A, B, E, F, G, H, I, S represents the land in controversy; S the point of beginning of the description, and Y, S, A, X the partition fence. The description in the complaint corresponds with the deed until it reaches A. Here begins the call: "thence along *said fence*, and on *said line of partition*, north 47½°, east 127 chains to the north boundary of the Rancho Salsi Puedes in the mountains." The plat shows what the findings state (find. 6), that if we follow the line indicated by the course and distance, "north 47½°, east 127 chains, we pass over the line A, B, the 127 chains terminating at B. But this does not satisfy the call for "*the north boundary of the rancho*" (find. 6), which can be reached only by prolonging the line A B "in the same northerly direction."—(find. 6.) Having arrived at the north boundary of the rancho on the mountain, the description proceeds: "thence by the following courses: N. 52½°, W. 11½ chs., &c., to the pasture fence;" and it is found, as represented in said plat, that neither by following the north boundary of the rancho, nor the north boundary of the tract sued for, can we arrive at "the pasture fence" represented by F G H, nor inclose the land. We must turn off at E, and the line E F is neither the north boundary of the premises sued for, nor the county line (see find. 8); but it runs at nearly right angles to these lines. The last call is also erroneous. If we adopt the call for the course and distance, we follow the line I J. If we discard the course for the monument, I S is the line.


North boundary of the Rancho Salsi Puedes
On the Mountains
C
D
Santa Clara County
County Line
N
B
E
North boundary of land sued for
end of 127 Chains
Premises in Controversy
1021 3/4 Acres
Santa Cruz County
F
G
Pasture fence
North 47 1/2 East 127 Chains
H
I
J
S. 41° 37' E
Y
White's Valley Partition Fence
A
S
Place of beginning
Fence and Line of Partition
X

ASSIGNMENT OF ERROR.

The plaintiff in error alleges that the court erred in admitting the said sheriff's deed to prove title to the land sued for by the defendant in error, and assigns that decision for error.—(See conclusions of law, p. 10.)

ARGUMENT.

Finding 9, p. 10, states "that all the calls in the said description under which defendant in error claims cannot be harmonized so as to inclose the land sought to be recovered," and, therefore, in order to apply the deed to the land in question it is necessary to reject, and the court does reject "as false, mistaken, and repugnant calls:"

1st. The call for the boundary to proceed from the beginning, a post marked "S" in the partition fence, "along said fence * * * to the north boundary of the Rancho Salsi Puedes in the mountains."

2d. The call to proceed "thence along said north boundary * * * to the pasture fence;" and to reject partially—

3d. The call "S. 41° 37′ *east* to the place of the beginning," and change it into "S. 41° 37′ *west* to the place of the beginning."

Instead of the two first-mentioned calls for objects which, in finding 6, are declared to be "well known and existing monuments," the court first adopts the courses and distances given in the deed, and then, instead of the courses and distances of the last-mentioned call, the court adopts the call for the monument. These contradictory rulings manifestly proceed on the assumption that the complaint gives the true description of the land which it was intended to convey, and that any calls in the deed which militate with that intent are false, mistaken, and repugnant. It may, indeed, be said that if the fence be followed, as required in the first call, the boundary of the

rancho on the mountain, which is also required, will not be reached, and, therefore, the course prescribed by which the mountain will be reached ought to be adopted. But if the course be taken for that reason, it ought to be adhered to till the mountain is reached, and not abandoned to adopt the call for distance, which would not have justified the abandonment of the call of the partition fence. Besides, the adoption of the call for distance requires not merely the abandonment of the call for the "partition fence" for the course of the line, and of the northern boundary of the rancho on the mountain for its termination, but requires the abandonment of the course of the northern boundary line on the mountain as the continuation of that line and the substitution of other courses and distances, and finally requires the abandonment of the course of the last line to inclose the land.

The reason of the rule which makes the call for monuments controlling over courses and distances in deeds *inter partes*, applies with still greater force to deeds by public officers. Monuments control ordinarily, because they are the visible and, therefore, the intelligible description to the common mind; whilst unplatted courses and distances convey but a vague idea to any mind, and to the public mind generally are but little better than a foreign language. When an individual uses them in descriptions the presumption is that the grantor has accompanied the surveyor, but it could not be supposed that the public which is invited to the sale had done so. Hence, when a sheriff's advertisement calls for a mountain and the line of a public survey on that mountain as the northern boundary of a tract, every one who had not followed the surveyor would be misled by the description, and the knowledge that the land of the defendant in the execution did not extend so far would deter them from bidding. "It would be a mockery of justice," as Chancellor Kent said in the DeLancy case, "to call that a description with such reasonable certainty as

would enable the people whom the law invites to such auction to know where and what the property is they are about to purchase."

With such freedom to cut and carve a description, as the court has here assumed, to adapt it to the exigencies of an assumed intent on the part of the grantor, there could be no failure to make out an inclosure in any deed.

Such a process would not be admissible even with respect to a deed *inter partes*, when, as it might be assumed that the grantor had some meaning, almost any liberty might be taken with his terms to extract it. But in a case where the deed is not, in fact, the deed of the person whose property it purports to transfer, but that of a public officer who attempts to transfer it against the will of the owner, the law in this as all other cases accords with the truth, and, therefore, implies no intent at all on the part of the owner, and hence the purchaser takes only what the terms of the deed, in their ordinary construction, clearly give; and if these terms, as the court finds, "cannot be harmonized so as to inclose the premises sought to be recovered, or any other land," the court is not at liberty to eliminate, first, the calls for such monuments, and then the calls for such courses and distances as may be necessary to make the description close and conform to the complaint.

If the purchaser of real estate at sheriff's sale be the plaintiff in the execution, he is accountable for all irregularities.—(Harrison vs. Rapp, 2 Blackford, p. 1.) The defendant in error was the plaintiff and the purchaser, and, therefore, is alone at fault for the defects in the deed. He had the direction of all the proceedings, and if the law permitted him to recover where the court finds that the land was sold under an advertisement, with calls "which cannot be harmonized so as to inclose the premises," the effect would be to enable the plaintiff, in an execution, to buy the defendant's land on his own terms. He has only to advertise by calls,

which cannot be made to inclose the land, except by the process here adopted, to have all the bidding to himself.

In Jackson vs. DeLancy, 13 J. R., 551, Chancellor Kent says: "No person can know what to bid or how to regulate his judgment if there be no certain or specific designation of the property. * * To tolerate such judicial sales would be a mockery of justice. It ought to be received as a sound and settled principle that the sheriff cannot sell any land on execution *but such as the creditor can enable him to describe with reasonable certainty, so that the people whom the law invites to such auctions may be able to know where and what is the property they are about to purchase.*" In this case, as in that upon which the Chancellor thus comments, part of the land sold was well described, and it did not appear in either case that the ill-described land sued for sold for anything.

In Mason vs. White, 11 Barbour, 185, the court says: "Public policy requires that the notices should contain a description by which premises can be located, so that all persons may bid and become purchasers upon *equal* terms."

In Rector vs. Hart, 7 Mo., 531, the court says: "A sheriff has no right to sell land except such as he can describe with sufficient certainty, so that purchasers may know what specific land is put up and where it lies."

In the case of Clemens vs. Rannells, 34 Mo., the court held a deed to be void which described the land as "all the right, title, and estate of James Mackey in a tract of land situate about 6 miles N. W. of St. Louis, on the river Des Peres, containing 1,500 arpens, more or less, granted to James McDaniel, July 1, 1798, by Don Zenon Trudeau, which adjoins the land granted to Mary L. Papin." The grant in question contained 1,800 arpents, and was located, and about 400 arpents had been conveyed in parcels to several persons, and these several parcels were located within it, so that the 1,400 which remained could be placed with certainty. But this was not done in the

advertisement, and for that reason the deed was held to be invalid.

The defendant having had the direction of the proceedings which resulted in the deed, the sheriff acting at his instance to effectuate his objects, and he, and not the plaintiff in error, being responsible for all irregularities in the proceedings and for the description furnished, it follows, that the deed must be construed most strongly against him; that its descriptive calls *must harmonize* to make it effective, and admit of no construction which rejects any of its words. The case of Mason vs. White, 11 Barbour, 173, is express on this point. The language of the court is: "In the construction of sheriffs' deeds every part of the description must be read and satisfied with reasonable certainty, *and no part of it can be rejected for its falsity.*"

This is the accepted rule, even with respect to the state, when it causes property of the citizen to be sold to pay taxes, although no *laches* can be imputed to the state; and it has the benefit of presumptions not allowed to individuals. It would be very easy to multiply decisions on this point, but as the proposition cannot be controverted, a few will suffice.—(See 19 N. H., p. 290; 22 Wisconsin, 167; 1 N. H., 93.)

In the case of Raymond vs. Longworth, 14 H., 76, a deed was held to be void under such a sale, in which the property was described as five acres of land situated in section 24, township 4, fractional range 1, in the city of Cincinnati, assessed to James Cooper, on the ground that the description did not sufficiently advise the public of the property offered for sale. Yet this description in a deed from Cooper himself would have been sufficient.

In Dyke vs. Lewis, 2 Barbour, 344, an officer's deed which gave a perfect description of the boundaries of the lot, but added the wrong number, was held to be bad. And in Tallman vs. White, 2 Comstock, 66, a description which sufficiently designated the lot was vitiated by ad-

ding that it was "*in the village of Lodi,*" a mistake which would not have frustrated the grant had it been the deed of the owner, because, the court say, "it would *then* present the question of what *the owner intended* to convey." But, the court adds, "there is no such question here. *The owner conveyed nothing, and does not intend to convey anything.*" As it is equally true in judicial as in tax sales that "the owner conveyed nothing, and did not intend to convey anything," no distinction is recognized between judicial and tax sales on this point. This is shown by the case of Mason vs. White, above cited, in which the court quotes the cases of Dyke vs. Lewis and Tallman vs. Smith, above cited, as applicable to that case. To the same effect in Jackson vs. De Lancy, 11 Johnson, 367, the court says, p. 373, that "a party conusant of his rights may sell or mortgage by general description, *though an officer must define what he sells.*" And in Jackson vs. Rosevelt, 13 J. R., 97, a sheriff's deed for "all the lands and tenements of the said Elizabeth and Sarah, heirs and devisees of said Lawrence Vankleeck, lying and being in the patent commonly called and known by the name of 'Hardensburg,' or great patent, in the county of Ulster," was declared to be inoperative and void for want of a sufficient description.

Other cases might be added, but these are sufficient to show that on this point there is no distinction recognized by the courts between deeds under judicial and those under tax sales. Both are sales by officers who "*must define what they sell,*" because, as "the owner conveys nothing, and does not intend to convey anything," there can be "no question (in either case) of what he intends to convey;" and consequently, no rejection of any of the terms of the deed, in either case, to carry out any such intent.

Nor was this proposition directly controverted below. But because it was shown that in certain cases a sheriff's deed might *be reformed* for fraud or mistake, in an action brought for that purpose, whilst it was not pretended that

this was an action for that purpose or that the pleadings admitted of the proceeding or that a decree could be entered in it reforming the deed, the court construed the deed as if such a decree had already been entered and the several calls for monuments and courses deemed erroneous had been duly eliminated. There was no case made for the reform of this deed at the trial below, and there was no authority shown for allowing the reform to be made at the trial of an action of ejectment, except where the *pleadings* demanded it by way of equitable relief.

Among cases cited by defendant in error is the case of Atkinson's Lessee vs. Cummings, 9 Howard, 484.

That case is thus stated in the head-note: "When a sheriff sold a tract of land under a *fieri facias* and made a deed of it to the purchaser, and it appeared afterwards that the debtor had two tracts near to but separated from each other, and the sheriff's deed described one tract accurately, except that it called to bound upon two parcels of land which are actually contiguous to the other tract, and the purchaser took possession of that to which the description was *mainly* applicable, and retained possession for nearly twenty years, parol testimony was admissible to show that the levy and sale applied to one tract only, and not to both."

It was not objected that, being *a sheriff's deed*, it was void because the description applied to *two* tracts, whilst purporting to convey *one*. The case turned on the question whether the call in the deed for one tract, or the call for the boundary which lay contiguous to the other tract should control, and that question depended on the question whether this ambiguity could be removed by showing that the plaintiff in error had acted on the construction which gave him but one tract. It was treated by both parties and by the court as a deed *inter partes*, and the question presented here was not suggested.

But in the case of Bartlett vs. Judd, 21 N. Y., 203, also cited below by the defendant in error, and relied on as overruling Mason vs. White, the point was made, and it was argued by counsel, on the authority of the case of Mason vs. White, that such a mistake in a sheriff's deed could not be reformed. The court held that the question was not raised in Mason vs. White, and hence not decided in that case; but decided that in the case then before it it was competent for the court to reform the deed, *the defendant having demanded it in his answer, by way of affirmative relief.*—(p. 201.) The court referred to the cases of Jackson vs. Roberts, 7 Wend., and Smith vs. Sears, 1 Hill, 17, where it was held that there could be no reform of the sheriff's deed in the action of ejectment, although the proof would have been sufficient if presented in the proper form. Under the new practice, the court adds, however, the deed can be reformed in connection with the action of ejectment if the grounds are set forth in the pleadings as a demand for equitable relief. Hence the position of defendant in error is shown to be untenable by the very case on which he chiefly relied to maintain it.

SUMMARY.

(1.) A sheriff's deed is strictly construed, and no property passes by it which is not described with reasonable certainty.

(2.) This requires that "every part of the description must be read and satisfied with reasonable certainty, and no part of it can be rejected for its falsity," and hence a description in which all the calls cannot be harmonized, and in which several of the calls for monuments and one of the calls for ~~corners~~ Courses must be rejected to enclose the land, has not the certainty required by law.

(3.) A sheriff's deed does not, like a deed *inter partes*, admit of the consideration of extraneous circumstances

to arrive at its intent. Its intent must be found in its terms, and if they are contradictory the deed is void, unless the circumstances are such as to entitle the grantee to have the deed reformed.

(4.) The proceeding to reform such a deed is in its nature an equitable proceeding, in which the relief and the grounds upon which it is asked for must be stated in the pleadings. In the absence of such a prayer, even if the proof showed a case for equitable relief, it would be error in the court to grant it, either directly by decree reforming the deed, or in effect by rejecting calls which the court finds to be false, mistaken, and repugnant.

(5.) No case for equitable relief is shown. There is no proof that it was actually made known that the land in question was the land offered for sale, or that it was a fair sale, or that anything at all was paid for it.

MONTGOMERY BLAIR.

APRIL, 1876.

United States Supreme Court.

WILLIAM F. WHITE and
LUCY B. WHITE,

Plaintiffs in Error,

vs.

NICHOLAS LUNING,

Defendant in Error.

POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

WM. IRVINE,
Attorney for Plaintiffs in Error.

SAN FRANCISCO:
W. P. Harrison, Book and Job Printer, 518 Sacramento Street.
1874.

United States Supreme Court.

WILLIAM F. WHITE AND
LUCY B. WHITE,
Plaintiffs in Error,

vs.

NICHOLAS LUNING,
Defendant in Error.

Points and Authorities of Plaintiffs in Error.

STATEMENT OF THE CASE.

The action is ejectment, and comes up on a Writ of Error to the United States District Court of the Ninth Judicial District, State of California.

The case is presented by the findings of the Circuit Judge. The land sought to be recovered is claimed to be portion of the rancho "Sal si Puedes," which is situated partly in Santa Cruz and partly in Santa Clara counties. The rancho was patented to the claimants by the United States in 1861, of whom William F. White, one of the plaintiffs in error, was one. Subsequently, and prior to the execution of the mortgage by White, mentioned in the findings,

the owners of the rancho partitioned it between themselves, several distinct parcels being set off to White. Sometime prior to April 11, 1866, the date of the foreclosure judgment described in the findings (the finding says April 11, 1866, but that date is erroneous, as it is that of the recovery of the judgment), William F. White mortgaged his portion of the rancho to the defendant in error.

On April 11th, 1866, Luning, the mortgagee, recovered judgment in the Third District Court, in Santa Cruz County, against White and others, defendants therein, decreeing a sale of the mortgaged premises. On August 20th, 1866, the Sheriff of Santa Cruz County, by virtue of the decree and order of sale, sold the mortgaged premises in several parcels, but not as described in the mortgage, decree, or order of sale (see 4th finding), at which sale Luning, the mortgagee and plaintiff in the foreclosure suit, purchased three of the several parcels sold, one of which was said to contain 1,021¾ acres, for the recovery of which this action is brought, upon the Sheriff's deed. The description of the demanded premises, as contained in the Sheriff's deed is set out in the 5th finding.

By the 8th and 9th findings, it appears that all the calls in the description cannot be harmonized so as to enclose the demanded premises. That the call continuing the line "along White's Valley partition fence" is repugnant and inconsistent. The call for "the northern boundary of the rancho Sal si Puedes

on the mountains," is false and mistaken. That the several calls to run along that northern boundary till the pasture fence is reached, are alike false and mistaken. And, that without rejecting each of said calls, the description will not enclose the land in controversy. The Circuit Judge rejected all these calls (which, excepting the starting-point and two other marks on the ground, constitute all the calls for monuments in the description), and adopts the courses and distances instead; changing the last course from West to East, and thus ascertains the land *intended* to be granted.

FIRST.

The rule of construction in the matter of description that applies to deeds executed and delivered *in invitum* will not be applied to conveyances made by public officers under forced sales.

Mason v. White, 11 Barbour (N. Y.) R. 173.
Cruger v. Dougherty, 1 Lansing, (N. Y.) R. 464.
Tallman v. White, 2 Comstock, (N. Y.) R. 66.
Peck v. Mullams, 10 N. Y. R., pp. 509—533.
Clemens v. Runnels, 34 Mo. R., pp. 579—584.
Throckmorton's Lessees v. Moore, 10 Ohio R. 42.

SECOND.

In ejectment brought on a Sheriff's deed, all the descriptive calls must be made to harmonize, without rejecting any, or the plaintiff cannot recover.

See authorities above cited.

THIRD.

So rigorously is the rule enforced in respect to such conveyances, that the description in a Sheriff's deed will not be corrected at the suit of the purchaser at the sale, or those claiming under him.

Rogers v. Abbott, 37 Ind. R. (cited in American Law Register 1873, p. 532.

See also Curtis v. Board of Supervisors, &c., 22 Wis. R., 167.

Orton v. Noonan, 23 *Ib.*, 102.

FOURTH.

Though a mortgage in this State is a mere security and not a conveyance of the land, perhaps if the description in the decree and Sheriff's deed is identical with that contained in the mortgage, the rule of construction of deeds made *inter partes* might be invoked; but where the Sheriff sells the land in parcels, and furnishes his own deseription, or substitutes another description for that contained in the mortgage, the purchaser is bound by it as made. There is then no question of the intention of the parties to the conveyance that can be invoked or ascertained to correct the description.

WM. IRVINE,
Att'y for Plaintiffs in error.

No. 244.

Supreme Court of the United States.

WHITE *et al.*,
Plaintiffs in Error,

vs.

LUNING,
Defendant in Error.

Brief of Argument on behalf of Defendant in Error.

SIDNEY V. SMITH & SON,
WM. HENRY RAWLE,
For Defendant in Error.

Allen, Lane & Scott's Printing House, 233 South Fifth Street, Philadelphia.

United States Supreme Court.

WILLIAM F. WHITE and LUCY B. WHITE, Plaintiffs in Error,

vs.

NICHOLAS LUNING, Defendant in Error.

COUNTER-STATEMENT OF DEFENDANT IN ERROR.

William F. White being the owner of certain portions of the Sal Si Puedes Rancho, situate in Santa Cruz county, having mortgaged the same, the mortgage was foreclosed. The California Civil Practice Act provides (section 223) that "the judgment debtor, if present at the sale, may direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately; *and the sheriff shall be bound to follow such directions.*"

White, accordingly, did direct the land to be sold as the same was afterwards described in the deed. This appears on the record, by the fourth finding of the court, viz.:—

(Record, page 7.) "*Fourth.*—That afterwards the defendant, William F. White, directed the said sheriff to sell said mortgaged premises in parcels, one of which parcels contained one thousand and twenty-one and three-quarters acres; and said sheriff thereupon, in obedience to said judgment and said direction of said

White, on the twentieth day of August, 1866, duly sold said premises in parcels, and at said sale the plaintiff became the purchaser of three of said parcels for the sum of $15,600, the other parcels being sold to other purchasers; which parcels are *not* separately described in the decree and order of sale, *but are embraced in the description therein set forth.*"

In other words, there was no description in parcels until the sheriff's sale came to be made.

The record further shows, (pages 7–9,) that while the premises mortgaged and sold were in Santa Cruz county, and, therefore, of course, sold by the sheriff of that county, the north boundary of the Sal Si Puedes extended into Santa Clara county, on another range of mountains, about three-quarters of a mile north of the Santa Cruz county line.

Whatever error there was, arose in the description of the four parcels furnished to the sheriff, and whatever may or may not have been the extent of this error, no one was injured by it—certainly not the defendants in the execution, (the plaintiffs in error,) for they must have been, if anything, benefited by the error, as a higher price would obviously be given for a tract so much larger than the one intended to be sold.

BRIEF OF ARGUMENT.

Admittedly there was and is no defense upon the merits. A mortgagor whose property has been sold under decree of foreclosure, and in a particular manner directed by himself, now seeks to recover it from the purchaser on the ground that the misdescription caused by his direction was so gross that no title passed.

And the only question before this court is whether any of the familiar rules of construction applied to deeds *inter partes* do or do not, *under any circumstances*, apply to sheriffs' deeds.

I.—In cases of deeds inter partes, erroneous descriptions will be rejected to conform to the true intent of the deed.

What was such intent in this case?

By the lithographed plan hereto attached, (which was in evidence on the trial,) it will be seen that the descriptive errors complained of were three.

1. The seventh course "along the pasture fence."

2. The description "to the north boundary of the Rancho Sal Si Puedes, on the mountain, thence along said north boundary."

3. The last course should be west instead of east.

Practically, these resolve themselves into one, for the first is no error at all, as the call for the pasture fence is complied with by the previous six courses, and were the word "thence" inserted, the direction would be clear; and as to the third error, it is of course too clear for argument that a monument being called for, viz., "the place of beginning, a post marked S," it was simply the case of a conflict between a monument and a course, where the latter obviously always yields, for nothing is better settled than that, other things being equal, boundaries prevail over courses;

Brown *vs.* Huger, 21 Howard, 306;
Howe *vs.* Bass, 2 Mass., 380;
Penman *vs.* Wead, 6 *id.*, 132;
Caldwell *vs.* Holder, 40 Penna., 168;
Lodge *vs.* Barnet, 46 *id.*, 477;
Warter *vs.* Picot, 33 Missouri, 490;
Kellogg *vs.* Muller, *id.*, 571;
Park *vs.* Pratt, 38 Vermont, 545.

As to the second erroneous description, viz., "to the north boundary of the Rancho Sal Si Puedes, on the mountains, thence

along said north boundary," if we follow it, we never reach four other monuments subsequently called for, viz.:—

1. The pasture fence,
2. The post marked S,
3. The forked red oak marked B T, and
4. The place of beginning.

Therefore it becomes a case of conflicting monuments, as to which the rule of law and of common sense is that the courses and distances are evidence of the true description, and where it appears from the deed that a monument is mistakenly inserted, it will be rejected;

Shipp *vs.* Miller, 2 Wheaton, 316;
Barclay *vs.* Howell, 6 Peters, 511;
Atkinson *vs.* Cummins, 9 Howard, 485;
Noonan *vs.* Lee, 2 Black, 504;
Davis *vs.* Rainsford, 17 Mass., 207;
Thatcher *vs.* Howland, 2 Metcalf, (Mass.,) 41;
Park *vs.* Loomis, 6 Gray, (Mass.,) 472;
Bosworth *vs.* Shutsvort, 2 Cush., (Mass.,) 393;
Hamilton *vs.* Foster, 45 Maine, 40;
Evans *vs.* Greene, 21 Missouri, 481;
Gibson *vs.* Bogy, 28 *id.*, 481;
Bass *vs.* Mitchell, 22 Texas, 285;
Browning *vs.* Atkinson, 37 Texas, 633;
Bagley *vs.* Morrill, 46 Vermont, 99.

And it is obvious that when the reason ceases for making monuments control, the rule also ceases; and, *a fortiori*, where, as here, all the courses and four subsequent boundaries harmonize, *one* conflicting boundary will be rejected.

Two other facts, which appear on the face of this deed, are in such cases very material; first, the expression of the quantity of land conveyed;

Kirkland *vs.* Way, 3 Richardson, (S. C.,) 4;
Mann *vs.* Pearson, 2 Johnson, (N. Y.,) 37;
Fuller *vs.* Caw, 33 New Jersey, 157;
1 Greenleaf on Evidence, page 437, n.

And, second, the question of ownership, for the land at the north boundary was in another county, and was not, so far as appears upon the record, owned by the plaintiffs in error at all. This is always deemed material;

Dygert *vs.* Phelps, 25 Wendell, (N. Y.,) 404;

Piper *vs.* True, 36 California, 619.

The obvious application of all these cases to the present is this: although, as a general principle, the construction of a deed is a matter of law to be determined by the court, yet at the trial of such cases at *nisi prius*, it is well settled that certain things in the deed are matters of fact for the jury, such as—in the absence of monuments, the variation of the needle at the date of the original survey—evidence of long-continued occupation, though beyond the given distances—if the description be doubtful, evidence of the practical construction given by the parties (1 Greenleaf's Evidence, section 302, n)—and, notably, the evidence of surveyors and others as to whether the description is sufficient to identify the land.

Now, in every case that comes before a court of error, it is presumed, in the absence of any bill of exceptions, that one or both parties offered evidence pertinent to the issue, and that the court properly received such evidence. It appears by the record in this case that evidence was produced;

"A jury having been waived by a stipulation of the parties in writing duly filed, this cause came to be heard without a jury on the twenty-seventh and twenty-ninth days of November, 1872, and *after hearing the testimony* and the arguments of counsel, the court being sufficiently advised, now find the following facts and conditions of law." (Record, page 7.)

Again, in the judgment roll it appears: "and the trial having been proceeded with on the 29th of said November, *and witnesses on behalf of the plaintiffs and of the defendant having been sworn and examined, and the evidence being closed,* the cause after arguments of counsel having been submitted to the court," &c. (Record, page 10.)

No assignment of error points to anything touching the evidence. We may therefore presume *de jure*, that both sides produced competent testimony as to the question of fact whether the description was or was not sufficient to enable the land to be identified and laid out as a tract; and this being found as by the verdict of a jury against the defendants below, their only remedy, in the absence of exceptions to testimony, is by motion for a new trial. They have none in a court of error.

But apart from this, even if the doctrine contended for by the plaintiff in error in the court below were adopted, the deed would still be sustained. For as their contention there (which now seems to be abandoned) was that monumental boundaries always govern, irrespective of circumstances, then we are entitled to the large tract of land comprised within those boundaries, viz., to a tract between the north boundary of the Sal Si Puedes, the pasture fence, the post marked S and the forked red oak marked B T, a *lot which would include the premises in dispute.*

Hence, for all or any of these reasons, if the plaintiffs in error had been the grantors in the deed they could not have successfully made this defense; and this they admit, for no exception has been taken or assignment of error made to this branch of the case.

The argument is then confined to the contention that a sheriff's deed must, in every instance, receive a different construction from a deed *inter partes.*

Now it is submitted that the law is well settled thus:—

(*a.*) In deeds *inter partes*, the familiar maxim applies—*omnia fortius accipiuntur contra proferentem*, and the purchaser has various remedies; namely, by action on the covenants, by action of deceit, by reformation of the instrument in equity, &c.

(*b.*) In cases of deeds made by public officers, such as sheriffs, marshals and the like, the rule is obviously otherwise; the deed

contains no covenants—it cannot usually be reformed in equity—and in some States cannot be altered and re-acknowledged, and the maxim is *caveat emptor*. But the difference extends no further than this, and the authorities are express that—

II. IN ALL THAT RELATES TO THE DESCRIPTION OF THE PROPERTY CONVEYED, THE RULES OF CONSTRUCTION ARE THE SAME IN ALL DEEDS, WHETHER INTER PARTES OR MADE BY OFFICIALS.

Thus, in Atkinson *vs.* Cummins, 9 Howard, 479, decided by this court in 1850, (which is the converse of the present case,) the defendant in the execution owned two lots,—one containing about three hundred and twenty-six, and the other about one hundred and fifty-eight acres; and the sheriff levied upon "a tract of land *adjoining the lands of James Henry*" (and a number of others), "containing about four hundred acres, more or less." The *fieri facias* and the *venditioni exponas* followed the levy, and the sheriff's deed contained the same description. The tracts of James Henry, &c. called for as boundaries, did *not* adjoin the large tract, but were adjacent to the smaller lot; yet it was held that evidence was properly admitted to show that the levy, the *fieri facias*, the *venditioni exponas and the sheriff's deed* were intended to be confined to the large tract, and hence that the deed passed no title to the smaller one.

It was simply a case of conflicting monuments, and the ordinary rules of evidence and of construction (*supra*, page 4) were applied to the deed, although executed by a sheriff. "It is contended," said Mr. Justice Grier, in delivering the opinion of the court, (page 485,) "that this testimony ought not to have been received because the levy, *fieri facias*, *venditioni exponas*, sheriff's deed, &c., are records, and parol evidence is not admissible to contradict, vary or limit the description of the premises contained in them. This proposition is, undoubtedly, true. But it assumes the very fact in dispute, and on which the jury were about to pass on parol proof given by both parties. It is true that

if a sheriff levies on a whole tract of land, and describes it accurately in his levy and deed, parol testimony cannot be received to show that he intended to sell less than his deed describes, or that he excepted part of the premises at the time of the sale. But this is not the case before us. The testimony offered is not to contradict the levy and deed, but to explain and confirm them. The plaintiff's testimony had shown that there was a latent ambiguity on the face of his deed. It purported to convey a single tract of land; it described one tract completely, with a single exception, which applied to another. It might be void for uncertainty, if its description equally applied to two tracts, while it clearly purported to convey but one. It might convey one, and the part of the description which did not apply to that would be rejected as *falsa demonstratio*, or misdescription; or it might possibly be intended to convey both; but in the present case the latter supposition had hardly a shade of probability to support it. It would be of little profit to notice the infinite variety of cases on this subject, or to seek for one precisely in point with the present. The general rule is well stated by Tindal, chief justice, in the case of Miller *vs.* Travers, 8 Bingh., 244, that 'in all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter intended to be granted or devised.' The testimony may have been superfluous and unnecessary, but it was not irrelevant or illegal. It did not contradict the record or deed under which the plaintiff claimed, but showed the gross injustice of the claim now attempted to be established under cover of an ambiguity in their terms."

So, in Marshall *vs.* Greenfield, 8 Gill & Johns., (Md.,) 358, in an action of ejectment by the sheriff's vendee, the court charged the jury that, owing to an imperfect description, the sheriff's deed passed no title; but in error this was reversed by the Court of Appeals, who said, "This is a judicial sale, made for the purpose

of carrying into effect the judgment of a competent court. The levy and sale were made by an acknowledged officer, in the regular course of duty, and no exceptions appear to have been taken to his proceeding for want of form at the return of the execution, when, on motion, any informality would have been examinable. The law regards such a proceeding with favor, and although it will not give effect to an instrument or paper executed by such an officer if its terms are unmeaning, or so entirely vague as to make it uncertain what was intended, yet every reasonable intendment will be made to secure *bona fide* purchasers, and to effectuate the object, which it was the duty, and, as the law presumes, the design of the officer to accomplish. *The presumption in such a case is at least as proper and as strong as in the case of a grantee claiming against a grantor*, when the utmost effect is given to the terms of the grant, *ut res magis valeat quam pereat.* It is admitted, and cannot be denied, that if this were the case of grantee against grantor the whole tract would pass."

So in Lodge *vs.* Barnett, 46 Penn. State R., 483, where the sheriff's levy and deed erroneously misrecited a measurement, the court, in sustaining the title of the vendee, said, "A sheriff has no power himself to divide lands in making a levy. He must follow the divisions made by the owner. The presumption is that a sworn officer does his duty. The legal intendment is that he did not mean to violate the defendant's rights. If, therefore, we find that he has followed the owner's interests in the main and substantial parts of his description, but has deviated in a minor particular only, we are to attribute that to a mistake rather than an intention to injure, if the evidence applying the description to the ground leads to that conclusion. It is well settled that you may not change or alter the levy by parol evidence, but you may show that its application to the subject-matter is incorrect; and if, without the erroneous part of the description it has sufficient elements left to identify the subject of sale it is sufficient. Thus, it often happens that a surveyor reverses or miscalls a course or omits a distance, or the scrivener

does the same, and it becomes impossible to close the survey, or in case of a reversal of courses, give it any proper shape, yet the tract or lot may be so described by other portions as to leave no doubt of its identity."

So, in Bartlett *vs.* Judd, 21 New York, 200, it was held that in ejectment by a sheriff's vendee, parol evidence is admissible to prove that the sheriff at the sale expressly excepted certain land out of a larger tract then exposed to sale. "The question," said the court, "is not as to what was the intention of the parties officiating at the sale, nor is it sought, strictly, to contradict the deed, and make it speak a language utterly at variance with its purport and meaning. But the point of inquiry is, what, as a matter of fact, was done by the sheriff at the sale? * * * *The plaintiff in this case stands in no better position than if this were a deed* inter partes."

So, in Mellon *vs.* Hammond, 17 Missouri, 192, the ordinary rule relating to conflicting courses and monuments was applied to a sheriff's deed, and the same decision was made in Collier *vs.* Vason, 12 Georgia, 440; and if the description of premises in a sheriff's deed is sufficient to identify them, although some particulars may be false or inconsistent, the deed will not be avoided;

Wing *vs.* Burgis, 13 Maine, 111;

Higgins *vs.* Ketchum, 4 Dev. & Bat., (N. C.,) L., 414.

So, where the description in the sheriff's deed comprises more land than was actually sold, the deed is good for the quantity sold. Thus in Farys *vs.* Farys, 1 Harper, (S. C.,) 261, where but one hundred acres was sold and the deed conveyed two hundred and sixty-five acres, the conveyance was held valid for the one hundred acres; and the same decision was made in Reid *vs.* Healsey, 9 Dana, (Ky.,) 326.

In the very recent case of Shewalter *vs.* Pisner, 55 Missouri, 219, the law was clearly stated;

"Was the description of the premises in controversy," said the court, (page 230,) "as it appears in the deed, so uncertain and indefinite as to render the deed void for uncertainty, or could the court properly receive parol evidence to show that the

premises were well known and easily identified and discovered by the description given?

"It is settled in this State by a number of decisions of this court, commencing with the case of Hart *vs.* Rector, 7 Mo., 531, and ending with the case of Webster *vs.* Blount, 39 Mo., 500, that parol evidence is admissible to show that the land described in a sheriff's deed is well known by the description given in the deed, however vague the description may appear. If the land sold is well known in the neighborhood and community where it is situate, by the description in the deed and levy, so that it can be seen that persons could not be misled or deceived by the description when applied to the actual premises in question, and that no sacrifice of the property could be produced by the description in the deed, it will be held sufficient. * * * I think that the evidence sufficiently shows that the description in the deed could mislead no one, and that the objection of the deed on that ground was properly overruled by the court below; Henry *vs.* Matthews, 38 Mo., 121; Bates *vs.* Bank of Missouri, 15 Mo., 309; Landes *vs.* Perkins, 12 Mo., 238; Evans *vs.* Greene, 21 Mo., 170; McCune *vs.* Hull, 24 Mo., 570.

"It is, however, contended by the respondent in this case that as the lot is described as fronting on Pine street, to show that it does not front on said street, but on Cedar street, is to contradict the deed, which is not permissible, and that Pine street, being a natural monument, must control the remainder of the descriptive words in the deed. It is very true that natural or known monuments will control courses or distances; but it is equally true that where there is a false call, demonstration or description in a deed, and the false description can be rejected and leave a sufficient description to identify the land, the false description will be rejected and the remainder of the description, being sufficiently certain, will be sufficient to pass the land; Cooley *vs.* Warren, 53 Mo., 166. The main question in this case is, was the description in the deed calculated to mislead or to produce a sacrifice of the property? I think that it was not."

The doctrine of these cases has been repeatedly followed;
Doe *vs.* Vallejo, 29 California, 388;
Quivey *vs.* Baker, 37 California, 471;
Dyson *vs.* Leek, 2 Rich., (S. C.,) 543;
Bates *vs.* Bank, 15 Missouri, 311;
Bank *vs.* Bates, 17 Missouri, 583;
Lisa *vs.* Lindell, 21 Missouri, 128;
Coffee *vs.* Silvan, 15 Texas, 354;
Hackworth *vs.* Zollars, 30 Iowa, 433;
Dygert *vs.* Phelps, 25 Wendell, (N. Y.,) 402.

None of the cases cited by the plaintiffs in error conflict with this settled rule; all that they decide is that where the description in a sheriff's deed is so vague and uncertain that purchasers or others are thereby misled, or where nothing appears whereby the premises may reasonably be located, the defendant's title will not be divested; and no one ever doubted that such was and is the law.

The cases thus cited are these:—
Mason *vs.* White, 11 Barbour, (N. Y.,) 173;
Cruger *vs.* Dougherty, 1 Lansing, (N. Y.,) 464;
Tallman *vs.* White, 2 Comstock, (N. Y.,) 66;
Peck *vs.* Mullams, 10 N. Y., 509;
Clemens *vs.* Runnels, 34 Mo., 579;
Throckmorton *vs.* Moore, 10 Ohio, 42;
Rogers *vs.* Abbott, 37 Ind., 140;
Curtis *vs.* Supervisors, 22 Wis., 167;
Orton *vs.* Noonan, 23 *id.*, 102.

And they may be thus briefly analyzed:—

In Mason *vs.* White, 11 Barbour, 184, the description was so vague and uncertain that it equally applied to two parcels, and it was attempted, as against a third person not present at the sale, to give evidence to show the intention of the sheriff at the sale, which, of course, was clearly inadmissible. For any other point the case is not authority, and in Bartlett *vs.* Judd, 21 New York, (Court of Appeals,) 204, it was said, "The case of Mason *vs.*

White, which is so much relied on by the counsel for the plaintiff, decides nothing adverse to these views; or, if it does, it cannot be followed as an authority in this court. There the deed was given, not to the purchaser at the sheriff's sale, but to the assignee of the certificate, a third party who did not appear to have been present at the sale, and was chargeable with no notice of what there took place. The question, also, was entirely different. The description of the land in the certificate and deed was so vague and uncertain that it was doubtful which of two pieces, either of which might be made to answer the description, was really intended to be sold; and the point of the inquiry was to ascertain what was the intention of the sheriff. The whole evidence was of the most vague and undecisive character, so much so as to induce the court to say they should have come to a conclusion upon it differing from that of the referee. In such a case, it may well be that such evidence should not be received. But when the learned judge in that case states that although, as between man and man, deeds may be explained and reformed by reason either of fraud or mistake, but that the deed of a sheriff cannot thus be reformed, he states a proposition for which I can find no authority in the books, and from which I am constrained to dissent. The only case referred to for this doctrine is Jackson *vs.* Delancy, (13 John., 539,) which certainly decides nothing more than that in a sheriff's deed the land must be described with reasonable certainty. The deed in that case having undertaken to convey, with two parcels well described, all the other lands of William, Earl of Stirling, in the county of Ulster, it was held to be void for uncertainty. No such principle as this was necessary to the decision in the case of Mason *vs.* White, which can well stand without its aid; and, if fully carried out, this doctrine would place both the certificates and the deeds of sheriffs utterly beyond the reach of the law, although its aid were invoked upon the clearest proof of inadvertence, mistake or fraud."

Cruger *vs.* Dougherty, 1 Lansing, (N. Y.,) 464, is not in point. In Tallman *vs.* White, 2 Comstock, (N. Y.,) 66, the description

was so imperfect that the defendant in error was himself misled; and in Peck *vs.* Mullams, 10 New York, 459, and Throckmorton *vs.* Moore, 10 Ohio, 42, nothing appeared by which the lot might be definitely located. In Clemens *vs.* Runnels, 34 Missouri, 579, parol evidence *was admitted* to apply the description of the premises conveyed; but the testimony was held to be too uncertain to ascertain the grant.

Curtis *vs.* Supervisors, 22 Wisconsin, 167, and Orton *vs.* Noonan, 23 *id.*, 102, were not cases of a bill in equity to reform a deed, but were decided upon tax deeds, which, taking effect under ministerial powers, are, of course, the subject of strict construction, and not aided by intendment. The principle upon which those decisions rest is well explained in Ware *vs.* Johnson, 55 Missouri, 503. The remaining case of Rogers *vs.* Abbott, 37 Indiana, 140, was a bill in equity to reform a deed conveying the south-west quarter of the *south*-east quarter, whereas the latter description should have been the *north*-east quarter. The wrong tract was ordered to be sold; was erroneously described in the decree, in the appraisement, in the advertisement, in the sale and in the deed. Therefore it was that the court said, "If we should correct the deed and attempt to vest in the plaintiff the title to the tract of land which he claims, we should give him land which was not ordered by the court to be sold, nor advertised by the sheriff, nor sold by him, nor purchased by the plaintiff."

But this plainly differs from the present case, where everything was perfectly regular and correct, save the description in the deed, and the case established no principle, for in Quivey *vs.* Baker, 37 California, 465, a sheriff's deed was reformed; and in Bartlett *vs.* Judd, 20 New York, 200, it was intimated that, did occasion require it, it would be reformed.

There are other aspects of the case leading to the same result, which need only a brief mention here.

Thus the sheriff might alter the description and re-acknowledge the deed.

So, the deed can be supported on the ground that it transferred the right, title and interest of the defendant in the execution in the whole large tract of land lying between the enumerated boundaries, and that the sale operated to estop the defendant from denying that whatever interest he had in those premises passed by the sale.

This was expressly decided in Hailey *vs.* Curry, 3 Strobh. (S. C.,) 99. "The plaintiff," said the court, "having purchased the land at sheriff's sale, as the property of the defendant, it was not competent for the defendant to dispute the plaintiff's title to all the land included in the sheriff's deed, any more than if he had conveyed it himself. By the deed, the sheriff conveyed all the land described in the deed by boundaries, one of which was Thomson's creek; but of what consequence was that? So far as the defendant had title, the sheriff conveyed it. The deed was inoperative as to third persons for any land to which the defendant had no title at the time of the sale; *but the defendant himself could not gainsay the accuracy of the description.* * * * *The accuracy of the description the defendant could no more dispute than if it had been contained in his own deed.* He could not dispute the plaintiff's title to all included within the boundaries, and therefore, as to him, the plaintiff had a right to recover all the land to Thomson's creek."

SIDNEY V. SMITH & SON,
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For Defendant in Error.